Asamatdin Kuljanov
https://doi.org/10.47689/978-9943-7818-6-3/iss1-pp67-71

THE ARBITRATION AGREEMENTS AND THE COMPETENCE OF INTERNATIONAL COMMERCIAL ARBITRATION

Abstract: *The text provides a comprehensive analysis of the role and evolution of international commercial arbitration as a method of alternative dispute resolution. It emphasizes the growing preference for arbitration in international commerce due to its speed, confidentiality, and perceived fairness. The text also highlights the efforts made by the Republic of Uzbekistan to develop its arbitration infrastructure, including its adherence to international conventions and the establishment of the Tashkent International Arbitration Center. The article further delves into the legal intricacies of arbitration agreements, discussing their validity, enforceability, and the formal requirements they must meet. It concludes by noting the ongoing changes in international standards and laws governing arbitration, suggesting that these are in response to the changing needs of the global market.*

Key words: *International Commercial Arbitration, Alternative Dispute Resolution, Republic of Uzbekistan, Tashkent International Arbitration Center, Confidentiality, Speed of Resolution, Fairness, Legal Infrastructure, International Standards, Arbitration Agreements, Validity, Enforceability, New York Convention, UNCITRAL, Investments, Business Environment.*

Аннотация: *Статья предоставляет комплексный анализ роли и трендов развития международного коммерческого арбитража как эффективного механизма альтернативного разрешения споров. Автор акцентирует внимание на растущей популярности арбитража в международной коммерции, основываясь на его преимуществах, таких как оперативность, конфиденциальность и перцепция справедливости. Отдельно рассматриваются усилия Республики Узбекистан по модернизации своей арбитражной инфраструктуры, в том числе через присоединение к международным конвенциям и создание Ташкентского международного арбитражного центра. Статья также детально изучает юридические аспекты арбитражных соглашений, включая их действительность, применимость и формальные критерии. Заключительная часть подчеркивает динамичный характер международных стандартов и законодательства в области арбитража, что, вероятно, является реакцией на эволюцию потребностей глобального экономического пространства.*

Ключевые слова: *Международный коммерческий арбитраж, альтернативное разрешение споров, Республика Узбекистан, Ташкентский международный арбитражный центр, конфиденциальность, скорость разрешения споров, справедливость, юридическая инфраструктура,*

международные стандарты, арбитражные соглашения, действительность, применимость, Нью-Йоркская конвенция, UNCITRAL, инвестиции, деловое окружение.

The text is particularly useful for legal scholars, policymakers, and business professionals interested in the dynamics of international commercial arbitration and its implementation in emerging markets like Uzbekistan. The mechanism of alternative dispute resolution was created to respond to the actual needs of the global market. At present, arbitration has become the preferred one in the field of international commerce among the methods of alternative dispute resolution as negotiation, mediation, and conciliation. The speed of resolution, confidentiality, flexibility, perceived fairness, and effectiveness are the main hallmarks that make arbitration attractive to the parties. According to the statistics provided by Arbitration Centers, in 2021, 853 cases in the International Court of Arbitration of the International Chamber of Commerce (ICC, Paris), 165 cases in the Arbitration Institute of the Stockholm Chamber of Commerce (SCC, Stockholm), 469 cases in the Singapore International Arbitration Center (SIAC, Singapore), 86 cases in the Swiss Arbitration Centre (SAC, Geneva) were registered [1].

Primarily, it should be noted that a priority area of activity for states interested in attracting foreign investment, including direct investment, is to create a comfortable legal environment and improve laws and practice of their application. One of the most important objects of application of such positive activity of the state should be the sphere of resolving international commercial disputes. Authoritative, qualified arbitration creates a respectable image of the state in the international business environment and strengthens its reputation, which, in its turn, leads to the stabilization of the economy, including through the creation of a favorable investment climate [2]. The Institute of International Commercial Arbitration has relatively and recently started to develop in the Republic of Uzbekistan. In particular, the Republic of Uzbekistan has been a party to the 1958 New York Convention (NYC) on the Recognition and Enforcement of Foreign Arbitral Awards since 1996. Of particular importance for the development of international commercial arbitration was the creation of the Tashkent International Arbitration Center (TIAC) at the Chamber of Commerce and Industry of the Republic of Uzbekistan with the status of a non-governmental non-profit organization by decree of the President of the Republic of Uzbekistan of November 05, 2018, No. PP-4001.

Additionally, to protect the rights and interests of business entities, primarily foreign investors, as well as to further improve the business environment and increase the investment attractiveness of Uzbekistan, the Law “On International Commercial Arbitration” based on the principles set out in the UNCITRAL Model Law of 1985, was adopted, which entered into force on February 16, 2021. Prior to this, there was no legal framework governing the

functioning of the activities of international arbitrations on the territory of Uzbekistan, which led to an increase in the costs of foreign investors and domestic business entities, who were forced to apply for dispute resolution to international arbitrations located on the territory of foreign states.

It is notwithstanding that for this legal institution, an impressive amount of scientific research was conducted, Uzbek legal science still lacks a comprehensive study on the competence of international commercial arbitration and the legal nature of the arbitration agreement. Hence, to understand the features of international commercial arbitration, a comprehensive study of the issues of competence, and arbitrability of commercial arbitration, along with the doctrine of "separability presumption" and "competence-competence" play a significant role.

International commercial arbitration has been undergoing significant changes in recent years. International standards that were considered to be a positive shift in arbitration three decades ago, today no longer correspond to the current needs of arbitration participants. Consequently, both national states and the international community are still attempting to adapt the recognized international rules governing the field of international commercial arbitration to modern conditions. This is graphically illustrated by the amendment of the UNCITRAL Model Law on ICA of 2006. One of the principal changes was the writing requirement of Article 7, which was substantially liberalized and modernized. Additionally, over the past few decades, the legislation of most countries has been tending to depart from the principle of non-arbitrability and narrow the scope of the non-arbitrability doctrine, including the subjects that may not be referred to arbitration.

Having studied the nature of arbitration agreements and the competence of the ICA, the author makes the following conclusions:

– There are two major characteristics of arbitration: Firstly, there is a need for valid consent between parties to submit a dispute to a non-governmental decision-maker, so it does not cover compulsory arbitration. Secondly, arbitration renders a final and binding award that is enforceable both nationally and internationally in all treaty states;

– Under the Law on ICA agreement is not "international", if the parties and all elements related to the dispute are located in one country and the parties submit their dispute to an arbitration court located in another country, yet the arbitration award is "international" according to NYC if it requires recognition and enforcement execution in the parties' place of business;

– An arbitration clause as a part of the commercial contract seeks to resolve future disputes, whilst the submission agreement relates to the dispute that has already arisen;

– The existence of a valid arbitration agreement is a substantial element of the arbitration agreement, which proves the express intention of the parties to entrust the differences between them to the decision of arbitration;

– The acceptance by a party of a host contract, despite the doctrine of separability, almost always entails acceptance of an arbitration clause in that contract, which in turn proves the existence of a valid agreement;

– The absence of incidental terms does not render the arbitration clause indefinite, since, in almost all jurisdictions, national law itself may provide for judicial selection of arbitrators and authorize the arbitral tribunal to perform various functions, such as selecting the arbitral seat and language [3];

– There is a difference between the existence of consent to an arbitration agreement and the formal validity of the arbitration agreement. [4] The former can be evidenced by oral communications, whereas the latter concerns the specific requirement for an arbitration agreement to be in writing or signed properly;

– The writing requirement in the Model Law is more lenient in comparison with the NYC since the NYC excludes oral arbitration agreements, including tacit/oral acceptances of written instruments and unsigned written contracts;

– Under the Law on ICA an agreement "in writing" requirement is met if its content is recorded in any form, even if the arbitration agreement or contract was concluded orally;

– The separability presumption applies in all cases, whether the contract is deemed inexistent, void, rescinded, obsolete, or terminated [5];

– Though the doctrine of separability says that an arbitration agreement should be treated as autonomous and juridically independent from the main contract in which it is contained, for some reasons, it is never wholly or necessarily "autonomous" or "independent" from the underlying agreement;

– The separability doctrine deals with the substantive validity of the arbitration agreement, whilst the competence-competence doctrine addresses the tribunal's power to consider and decide jurisdictional issues when the arbitration agreement is challenged;

– Notwithstanding the close meaning, the concepts of "capacity" and "arbitrability" are strictly separated based on the choice of law method;

– It is practically impossible to definite the concept of "public order" at the legislative level, since each judicial system of each state determines independently the content of this concept, and based on the current conditions in the state, the understanding of public order may change.

Within this article, two major problems were outlined: a) there are discrepancies between the provisions of the Law on the ICA and the Civil Code regarding the "writing" requirement; b) the category of disputes that are non-arbitrable is not still defined by the legislature.

Regarding the "writing" requirement we summarized that the provisions of the Law on the ICA and the Civil Code in some aspects contradict each other. Particularly, under the Law on ICA, the writing requirement is met even if the arbitration agreement was orally concluded, by conduct, or by other means, and there is no signatory requirement. On the contrary, the Civil Code requires that an agreement made in writing must be signed by the parties or their representatives.

The Law on ICA, following the Model Law, adopted modern provisions based on practical considerations that satisfy the needs of the parties. The same approach given in the Law on ICA should be applied to the Civil Code.

Therefore, there is a need for amending Article 107 "Written form of the transaction" of the Civil Code of the Republic of Uzbekistan. In particular, the wording of the requirement regarding the written form, taking into account the provision of article 12 of the ICA Law, should be altered as follows: agreement is in writing if its content is recorded in any form, whether or not the agreement or contract has been concluded orally, by conduct, or by other means. Principally the wording of Article 107 should emphasize "whether or not the agreement or contract has been concluded orally, by conduct, or by other means".

As outlined before, the Model Law does not contain provisions that consider a certain type of dispute as non-arbitrable. The question of arbitrability is exceptionally up to every legislature. However, the national legislation of the Republic of Uzbekistan is still silent about the subject of non-arbitrability. Neither the EPC nor the Law on the ICA has provisions characterizing a particular category of disputes that cannot be resolved by arbitration or which type of disputes are in the domain of the national court. In turn, case law indicates that national legislation should explicitly exclude arbitration for a certain category of legal disputes if the legislature intends to do so.

Therefore, in our opinion, the list of a certain category of disputes that are non-arbitrable and are only in the domain of the national courts should be included in the EPC or Law on ICA. Particularly, the legislature should include in the EPC or the ICA Law an article, the provision of which prescribes a special category of disputes that cannot be settled by arbitration and which are exclusively within the competence of national courts. This provision may put an end to controversy when a question arises on the subject of arbitrability.

References:

1. https://iccwbo.org; https://sccinstitute.com; https://www.siac.org.sg; https://www.swissarbitration.org//. [Internet resource. Last visited: 1.04.2022].

2. Отахонов Ф.Х. Альтернативное разрешение споров // Перспективы развития международного коммерческого арбитража в Узбекистане. Сборник статей. – Т.: 2022. – С.

3. G. Born, 2012. – P. 110.

4. Case Buckeye Check Cashing: "The issue of the contract's validity is different from the issue of whether any agreement between the alleged obligor and obligee was ever concluded."

5. T. Clay, "Liberté, Egalité, Efficacité": La Devise du Nouveau Droit Français de l'Arbitrage, 139 J.D.I. (Clunet) 8 (2012).